89-1230

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF CHICAGO and SUPERINTENDENT OF POLICE,

Petitioners,

v.

WALTER FRIEDRICH, individually and on behalf of a class of similarly situated persons,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, authorizes an award of expert witness fees in excess of the $30 per day allowed by 28 U.S.C. §§ 1821, 1920(3).

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IN THE

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OCTOBER TERM, 1989

CITY OF CHICAGO and SUPERINTENDENT OF POLICE,

Petitioners,

v.

WALTER FRIEDRICH, individually and on behalf of a class of similarly situated persons,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, the City of Chicago ("City") and the Superintendent of the Chicago Police Department, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on October 31, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 888 F.2d 511 and is reprinted in the appendix hereto at App. 1, *infra*.

The opinion of the United States District Court for the Northern District of Illinois (Aspen, D.J.) has not been reported. It is reprinted in the appendix hereto at App. 19, *infra.*

JURISDICTION

The respondent brought this suit in the Northern District of Illinois under 42 U.S.C. § 1983. The district court's jurisdiction was based upon 28 U.S.C. § 1343(3) and (4).

On September 15, 1988, the Northern District entered judgment in favor of plaintiffs on plaintiffs' petition for fees and costs under the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988.

On petitioner's appeal, the Seventh Circuit affirmed the district court on October 31, 1989. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1988

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

28 U.S.C. § 1920

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1821

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance

at the beginning and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance shall be paid to a witness in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel

in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services, as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

STATEMENT OF THE CASE

This petition concerns the authority of the district court to award expert witness fees to a prevailing plaintiff in a civil rights action under 42 U.S.C. § 1988.

Plaintiffs filed their underlying civil rights class action lawsuit against the defendants on September 7, 1984, challenging the constitutionality of a Chicago municipal ordinance which banned street performers in the North

Michigan Avenue and Rush Street areas in the City. (For further details about the underlying claim, *see Friedrich v. City of Chicago*, 619 F. Supp. 1129 (N.D. Ill. 1985)). The plaintiffs prevailed on a portion of their claims and petitioned for attorney's fees and costs. The district court awarded plaintiffs their requested attorney's fees and costs pursuant to 42 U.S.C. § 1988, which allows a district court to award a prevailing party in a civil rights suit a "reasonable attorney's fee as part of the costs." Plaintiffs used two experts at trial: Robert J. diGrazia and William H. Whyte. Robert J. diGrazia testified "as an expert in the area of law enforcement." William H. Whyte testified as an expert on urban planning and design.

The $7,901.25 requested by plaintiffs to cover the costs of Robert J. diGrazia included diGrazia's charges of $200 per hour for 27.45 hours of preparation, travel time and court appearance time, and $2,411.25 for his travel expenses. The $2,026.66 requested by plaintiffs to cover the costs of William H. Whyte included Whyte's charges of $500 per day for two days of research and testimony preparation and $1,026.66 for travel expenses. The district court allowed in full the expert witness fees requested by the plaintiffs. The petitioners appealed from the portion of the district court order that awarded plaintiffs expert witness fees of $9,927.91.

The Seventh Circuit affirmed the district court's award of expert witness fees under § 1988, reasoning that Congress chose the statutory term "reasonable attorney's fee" "as a shorthand expression for such fees and other expenses as the district court might in the exercise of its equitable discretion reasonably believe should be reimbursed to the prevailing party." App. 13.

REASON FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S CONSTRUCTION OF THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS INTERPRETING THIS COURT'S DECISION IN *CRAWFORD FITTING.*

In *Friedrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989), the Seventh Circuit decided that expert witness fees are recoverable under the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. In so deciding, the court construed the statutory term "reasonable attorney's fee" as including expert witness fees. The Seventh Circuit held that the $30 per day witness fee prescribed by 28 U.S.C. § 1821(b) does not apply to cases in which a prevailing party is entitled to attorney's fees under 42 U.S.C. § 1988. The petition for a writ of certiorari should be granted in this case because the Seventh Circuit's decision conflicts squarely with the Third Circuit's decision in *West Virginia University Hospitals, Inc. v. Casey*, 885 F.2d 11 (3d Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3430 (U.S. Jan. 9, 1990) (No. 89-994). In *Casey* the Third Circuit decided that "section 1988 as presently drafted does not authorize expert fee awards in excess of the statutory cap of thirty dollars per day provided in section 1821(b)." *Id.* at 34, 35. Both the decision below and the Third Circuit's decision in *Casey* were based on this Court's decision in *Crawford Fitting Co. v J. T. Gibbons, Inc.*, 482 U.S. 437 (1987). The Third Circuit recognized that *Crawford Fitting* "repudiates the previous law [of the Third Circuit which allowed] enhanced awards of expert witness fees under Section 1988." 885 F.2d at 33. The Third Circuit found that this Court's subsequent decision

in *Missouri v. Jenkins*, 109 S. Ct. 2463 (1989) does not affect the reasoning of *Crawford Fitting*. In *Friedrich*, by contrast, the Seventh Circuit found that *Crawford Fitting*, read in light of *Jenkins*, required the opposite result.

In addition to conflicting with *Casey*, the decision in *Friedrich* conflicts with decisions of the First, Fourth, Fifth and Eleventh Circuits interpreting *Crawford Fitting* before *Jenkins* was decided. *Denny v. Westfield State College*, 880 F.2d 14654 (1st Cir. 1989); *Sevigny v. Dicksey*, 846 F.2d 953 (4th Cir. 1988); *Leroy v. City of Houston*, 831 F.2d 576 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1735 (1988); *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir.), *cert. denied*, 109 S. Ct. 378 (1988).

In *Crawford Fitting*, 482 U.S. 437, 439, this Court held that the $30 per day limit controlled "absent . . . explicit statutory authority to the contrary." The Court thereby affirmed two consolidated Fifth Circuit cases: an antitrust case in which the Fifth Circuit had reversed a district court award of expert witness fees in excess of $30 per day, and an employment discrimination case in which the Fifth Circuit had affirmed a district court's refusal to award expert witness fees in excess of $30 a day.[1] Because § 1988 was not directly at issue in *Crawford Fitting*, as the dissent noted, 482 U.S. at 446 n.1, the Court's opinion does not discuss the availability of expert witness

[1] The employment discrimination case, *International Woodworkers of America v. Champion Intern.*, 790 F.2d 1174, 1178, 1181 (5th Cir. 1986) (en banc), *aff'd*, 482 U.S. 437 (1987) held that excess expert witness fees were unavailable under Federal Rule of Civil Procedure 54(d) *or* under 42 U.S.C. § 1988. The Supreme Court discussed only Federal Rule of Civil Procedure 54(d) because the petitioner had not appealed from the district court's order denying fees under § 1988. 482 U.S. at 446 n.1.

fees under § 1988. Nevertheless the Court's reasoning clearly does not allow such awards.

In *Crawford Fitting*, and in an earlier case, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court reviewed the history of cost-shifting in American law. In 1853, Congress enacted the 1853 Fee Act in order to bring about consistency in the federal courts' awarding of costs to prevailing parties. 482 U.S. at 440. The Act set forth "the nature and amount of the taxable items of cost in the federal courts," *Alyeska*, 421 U.S. at 251-52, among them, witness fees, then set at $1.50 per day, *Crawford Fitting*, 482 U.S. at 440. Sections 1920 and 1821 are the present-day descendants of the 1853 Fee Act whose "sweeping reforms . . . have been carried forward to today 'without any apparent intent to change the controlling rules.' " *Id.*, quoting *Alyeska*, 421 U.S. at 255.

The general "American Rule" allows the prevailing party to recover only those costs which were known historically as "costs 'between party and party.' " *International Woodworkers*, 790 F.2d at 1176, quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939). Other costs, such as attorney's fees and expert witness fees, historically known as "costs . . . 'between solicitor and client,' " are not generally recoverable except when (1) a losing party has pressed a claim or defense in bad faith, (2) the prevailing party acted to recover a fund for the common benefit of a group of beneficiaries, or (3) a party has wilfully disobeyed a court order. *Alyeska*, 421 U.S. at 245, 259-60; *International Woodworkers*, 790 F.2 at 1177. None of these exceptions applies in the present case.

Aside from these three exceptions, as this Court held in *Crawford Fitting*, § 1821's limits apply "absent explicit

statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs." 482 U.S. at 439. In *Alyeska*, 421 U.S. at 260, this Court noted that Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." Similarly, Congress has extended no such authority to the judiciary to award expert witness fees.

The statute relied upon by the district court in this case, 42 U.S.C. § 1988, contains no explicit authorization for the taxation of expert witness fees.

The Seventh Circuit, interpreting this Court's most recent decision in the area, *Missouri v. Jenkins*, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989), concluded that § 1988's meaning is not limited to "the statute's 'plain language'." App. 3. In *Jenkins* the Supreme Court held that the "attorney's fee" allowed by § 1988 may include market rate compensation for the work of law clerks and paralegals. 105 L. Ed. 2d at 240. The court reasoned that

> [c]learly, a "reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit.

105 L. Ed. 2d at 241. The Seventh Circuit read *Jenkins* and an earlier Seventh Circuit case that had permitted recovery of telephone and travel expenses under § 1988, *Henry v. Webermeier*, 734 F.2d 188, 192 (7th Cir. 1984), as supporting the proposition that "maybe one of the

other things 'attorney's fee' can mean is the fee paid an expert witness or consultant." App. 3. The court found that in passing the Civil Rights Attorney's Fees Award Act of 1976, Congress intended to restore to the judiciary the equitable power to award attorney's fees and expenses in civil rights cases. Many federal courts had believed they possessed such equitable power until the Supreme Court ruled otherwise in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). According to the Seventh Circuit, Congress "us[ed] 'reasonable attorney's fee' as a shorthand expression for such fees and other expenses as the district court might in the exercise of its equitable discretion reasonably believe should be reimbursed to the prevailing party." App. 10.

As noted above, the other court of appeals that has considered the impact of *Jenkins* on *Crawford Fitting* reached a conclusion opposite to the Seventh Circuit's conclusion in *Friedrich*. *See West Virginia University Hospitals, Inc. v. Casey*, 885 F.2d 11, 34 (3d Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3430 (U.S. Jan. 9, 1990) (No. 89-994). In *Casey* the Third Circuit found that *Missouri v. Jenkins*, 109 S. Ct. 2463 (1989) does not affect the reasoning of *Crawford Fitting*. In *Jenkins*, the dispute about § 1988 concerned fees for the services of paralegals and law clerks and not witness fees. The court in *Casey* noted that fees for paralegals and law clerks are not regulated by statute, whereas witness fees are limited by 28 U.S.C. § 1821. Furthermore, the defendant in *Jenkins* did not contest the legitimacy of paying paralegal fees under § 1988, but only whether those fees should be paid at market rate or at the cost to the attorneys. *Jenkins*, therefore, did not modify the rule of *Crawford Fitting*: "[U]nless the statute under which expert witness fees are awarded expressly repeals the limits of sections 1920 and 1821(b), we must defer to legislative fiat." 885 F.2d at 34.

Indeed, the weight of authority after *Crawford Fitting* is with the Third Circuit, not the Seventh Circuit. Many federal circuit courts of appeals have reasoned that the "broad language in *Crawford Fitting* indicates that, although a statute may shift *attorney* fees, the statute does not operate to shift *witness* fees unless the statute refers explicitly to witness fees." *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1575 (11th Cir. 1988) (holding that 29 U.S.C. § 216(b), which allows the plaintiff in an Equal Pay Act action to recover "a reasonable attorney's fee . . . and costs of the action," does not permit the recovery of expert witness fees). *Accord Denny v. Westfield State College*, 880 F.2d 1465 (1st Cir. 1989) (excess expert witness fees not recoverable in Title VII case absent explicit Congressional authorization); *Sevigny v. Dicksey*, 846 F.2d 953, 959 (4th Cir. 1988) ("§ 1988 does not provide statutory authority for the awarding of compensation for non-legal experts"); *Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1298 (1988) (expert witness fees not recoverable in civil rights case); *Leroy v. City of Houston*, 831 F.2d 576, 584 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1735 (1988) (expert witness fees not recoverable under the Voting Rights Act because Act does not specifically allow recovery). Even the Eighth Circuit which had previously ignored *Crawford Fitting's* rationale and affirmed an excess expert witness fee under § 1988, *SapaNajin v. Gunter*, 857 F.2d 463, 465 (8th Cir. 1988), recently affirmed a district court order limiting expert witness fees under § 1988 to $30 per day. *Gilbert v. City of Little Rock*, 867 F.2d 1062 (8th Cir. 1989) (en banc) (affirming district court by equally divided vote). Federal district court decisions are in considerable disarray, evidencing confusion over this issue. *See, e.g., Norwood v. Charlotte Memorial Hosp. & Med. Center*, 720 F. Supp. 543, 546 (W.D.N.C. 1989); *Degidio v. Pung*, 723 F. Supp. 135, 140 (D. Minn. 1989).

Many of the cases contrary to *Friedrich* have noted the large number of federal statutes that expressly permit expert witness fees to be taxed as costs. *E.g. International Woodworkers*, 790 F.2d at 1179, n.7. Section 1988 differs from these statutes by its omission of any statement permitting recovery of expert witness fees. In contrast, the Consumer Product Safety Act, for example, explicitly permits a court to award "reasonable expert witness fees" in an action for review of a consumer product safety rule, 15 U.S.C. § 2060(c). It also permits a person who sues for an injury caused by the knowing violation of a Consumer Product Safety Commission Rule to "recover the costs of suit, including . . . reasonable expert witnesses' fees," 15 U.S.C. § 2072(a), and permits a court to award "reasonable expert witnesses' fees" in an action for enforcement of a consumer product safety rule, 15 U.S.C. § 2073.

Section 1988 merely creates an exception to the general American Rule regarding attorney's fees. Those fees, which are not generally recoverable as part of the prevailing party's costs, are made recoverable by § 1988 which allows a prevailing party in a civil rights action to recover a "reasonable attorneys' fee as part of the costs." As the Fifth Circuit reasoned, "[g]iven Congress' ability to provide explicitly for the taxing of excess expert witness' fees as costs, we should not infer congressional intent to award such costs in the absence of an express statute so providing." *International Woodworkers*, 790 F.2d at 1179-80.

As discussed above, certiorari should be granted to review the Seventh Circuit's opinion because it departs radically from the reasoning of this Court and the decisions of other courts, particularly the Third Circuit. Until this Court resolves whether expert witness fees are available under § 1988 and other fee shifting statutes, the availabil-

ity of these fees will depend on the geographical location of the parties. This issue can arise in any case involving a statute that shifts attorney's fees but is silent regarding witness fees.[2] Petitioners respectfully urge this Court to settle this question by granting their petition. In the event that this Court grants the petition in *West Virginia University Hospitals, Inc. v. Casey*, 885 F.2d 11 (3d Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3430 (U.S. Jan. 9, 1990) (No. 89-994), petitioners request that this petition be held in abeyance pending resolution of *Casey*.

CONCLUSION

For all the foregoing reasons, defendants respectfully request that this Court grant the Petition for Writ of Certiorari to the Seventh Circuit to review this case.

Respectfully submitted,

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[2] *See, e.g.*, 12 U.S.C. § 4010; 15 U.S.C. § 72; 29 U.S.C. § 216(b); 42 U.S.C. § 2000e-5(k).

APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-3043

WALTER FRIEDRICH, individually and on behalf of a class of similarly situated persons,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO and FRED RICE, Superintendent of Police, in his official capacity,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 7719—**Marvin E. Aspen,** *Judge.*

ARGUED SEPTEMBER 8, 1989—DECIDED OCTOBER 31, 1989

Before CUMMINGS and POSNER, *Circuit Judges*, and GORDON, *Senior District Judge.**

POSNER, *Circuit Judge.* The question presented by this appeal is whether the judge in a civil rights case may order the losing party to reimburse the cost incurred by the winner to hire an expert witness. The Civil Rights Attorney's Fees Awards Act of 1976, amending 42 U.S.C.

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* Hon. Myron L. Gordon of the Eastern District of Wisconsin, sitting by designation.

§ 1988, provides that in any suit under a variety of federal civil rights statutes, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" paid by the loser. As interpreted by the courts, the Act entitles a prevailing plaintiff to such an award as a matter of course, but a prevailing defendant only if the suit was completely groundless. *Hensley v. Eckerhart*, 461 U.S. 424, 429 and n. 2 (1983). The Supreme Court has also read the statute to allow as part of the "reasonable attorney's fee" the award of paralegal fees, even though paralegals are not attorneys. *Missouri v. Jenkins*, 109 S. Ct. 2463 (1989). And this court, in a decision the defendants do not question, has authorized the award—again as part of the reasonable attorney's fee—of lawyers' out-of-pocket expenses of travel, investigation, and other trial preparation. See *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984). Many other courts have done likewise. See cases cited in *International Woodworkers v. Champion International Corp.*, 790 F.2d 1174, 1184-86 (5th Cir. 1986) (en banc) (dissenting opinion), aff'd under the name of *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); cf. *Mennor v. Ford Hood National Bank*, 829 F.2d 553, 557 and n. 22 (5th Cir. 1987).

The specific question presented by this appeal, however, is new in this circuit and has caused a division among several others. See, e.g., *West Virginia University Hospitals, Inc. v. Casey*, No. 89-5165 (3d Cir. Sept. 5, 1989); *SapaNajin v. Gunter*, 857 F.2d 463, 465 (8th Cir. 1988); *Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir. 1983); *Sevigny v. Dicksey*, 846 F.2d 953, 959 (4th Cir. 1988); cf. *Denny v. Westfield State College*, 880 F.2d 1465 (1st Cir. 1989). It is whether the expenses reimbursable under the statute include fees that the prevailing party pays to an expert hired to advise or testify in the case. The district court held that experts' fees are reimbursable under section 1988, and, in this successful suit under 42 U.S.C. § 1983 by a class of "breakdancers" and others to invalidate on First Amendment grounds a Chicago ordinance restricting street performances, see 619 F. Supp. 1129 (N.D. Ill.

1985), awarded the plaintiffs almost $10,000 for the fees they had incurred in hiring two experts to advise and testify. The reasonableness of the expenditure is not in question. The total award of attorney's fees, expenses (including the experts' fees), and costs approached $42,000.

The Supreme Court and this court have rejected the strongest argument against the district court's result, the argument from the statute's "plain language." The fee statute authorizes the award of a reasonable *attorney's* fee, and an expert witness or consultant is not an attorney. But neither is a paralegal, yet paralegal fees may be awarded (*Jenkins*). An attorney's travel expense or long-distance telephone expense is not an attorney's *fee*, yet is awardable too (*Henry*). And although the statute makes no distinction between a prevailing plaintiff and a prevailing defendant, the standard for an award of fees is different in the two cases (*Hensley*).

The defendants argue that a paralegal is more like an attorney than is an economist, a psychiatrist, a police commissioner (one of the experts here), or a sociologist (the other—William Whyte, of *Organization Man* fame). That may be, but it does not touch the question whether the fee statute is to be read literally. A sheep is more like a goat than it is like an ostrich; but if a statute regulating sheep had been applied to goats, an attempted application to ostriches could not be defeated simply by pointing out that an ostrich is not a sheep. If "attorney" in the fee statute can mean something different from attorney, and "fee" something different from fee, then maybe one of the other things "attorney's fee" can mean is the fee paid an expert witness or consultant.

We are quite aware that appeals to literalism are common. The cases are thick with references to "plain meaning" and with such tired saws as that interpretation must begin with the words of the statute—and stop there if they are clear. See, e.g., *United States v. Ron Pair Enterprise, Inc.*, 109 S. Ct. 1026, 1030 (1989), and other cases cited in *In re Sinclair*, 870 F.2d 1340, 1341-42 (7th Cir. 1989). In fact, interpretation must begin with the linguistic

and cultural competence presupposed by the author of the statute. "Language is a process of communication that works only when authors and readers share a set of rules and meanings. . . . To decode words one must frequently reconstruct the legal and political culture of the drafters." *Id.* at 1342. (Goodness knows what the civil rights fees statute would mean to someone outside the legal culture!) As shown by *Jenkins*, a 7-1 decision on the meaning of the civil rights fee statute (the Court divided more closely on another issue), rendered less than a year ago, and by countless other cases including *Hensley* and *Henry*, judges realize in their heart of hearts that the superficial clarity to which they are referring when they call the meaning of a statute "plain" is treacherous footing for interpretation. They know that statutes are purposive utterances and that language is a slippery medium in which to encode a purpose. They know that legislatures, including the Congress of the United States, often legislate in haste, without considering fully the potential application of their words to novel settings. The presence of haste here is suggested by the fact that the civil rights fees statute was passed on the last day of the Ninety-Fourth Congress.

When a court can figure out what Congress probably was driving at and how its goal can be achieved, it is not usurpation—it is interpetation in a sense that has been orthodox since Aristotle—for the court to complete (not enlarge) the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly or used a more perspicuous form of words. That is what the Supreme Court did in the *Jenkins* case. The civil rights fee statute had been passed the year after *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), cut off a trend in the lower federal courts toward awarding prevailing parties in civil rights and other cases, conceived of as "private attorneys general," a reasonable attorney's fee as a matter of federal equity power. Noting that the fee statute had been enacted in order to overrule *Alyeska* with respect to civil rights cases, the Court in *Jenkins* asked whether an

award of paralegal fees would serve the statutory purpose, and concluded that it would. See 109 S. Ct. at 2471. Paralegals provide a low-cost substitute for work that would otherwise be performed by the attorney himself. The substitute is part of the attorney's work product. If fees for the services of paralegals could not be shifted to the losing party, as attorney's fees can be, there would be an incentive to substitute attorney time for paralegal time. So even defendants would be made worse off in the long run; they would be paying for the same work but at a higher rate. *Shipes v. Trinity Industries, Inc.*, 685 F. Supp. 612, 615 (E.D. Tex. 1987). A nonliteral interpretation was necessary to make sense of the statute.

Much the same argument can be made for the shifting of experts' fees. Experts are not only hired to testify; sometimes they are hired, also or instead, to educate counsel in a technical matter germane to the suit. The time so spent by the expert is a substitute for lawyer time, just as paralegal time is, for if prohibited (or deterred by the cost) from hiring an expert the lawyer would attempt to educate himself about the expert's area of expertise. To forbid the shifting of the expert's fee would encourage underspecialization and inefficient trial preparation, just as to forbid shifting the cost of paralegals would encourage lawyers to do paralegals' work. There is thus no basis for distinguishing *Jenkins* from the present case so far as time spent by these experts in educating the plaintiffs' lawyer is concerned (we can find no merit in a distinction based on the difference between an employee and an independent contractor), and so we think the district judge must have been right at least in part. If so, this is a reason for thinking he was right in whole, for it is difficult to separate time spent by an expert in educating the lawyer from time spent in preparing to testify. Sometimes it is impossible; the same time may serve both purposes.

Time actually spent on the stand, however, is not easily conceived of as a substitute for lawyer time or lawyer work product. And such time is easily separated out from

the other time spent by an expert on a case, though usually it is just the tip of the iceberg; in this case, so far as we can determine, less than ten percent of the money paid the experts was for time actually testifying. But the Court in *Jenkins* did not insist on a relation of substitution for paralegal fees to be shifted, and of course paralegals do not just do at lower cost what lawyers do. In part because they *are* cheaper, they do things that lawyers would not consider worth *their* while to do. They expand the scope of trial preparation. And so it is with experts.

But when applied to the time the expert spends on the stand, this analysis reckons without the general federal cost and witness-fee statutes, and their interpretation by the Supreme Court in *Crawford Fitting Co. v. J.T. Gibbons, Inc., supra*, anticipated in *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908, 912 (7th Cir. 1986). Section 1920 of the Judicial Code lists items that a federal judge may tax as costs. "Compensation of court appointed experts" is one of these, see § 1920(6), but the experts in this case were not appointed by the court and the statute makes no explicit reference to experts retained by a party. Another item in the list is witness fees, § 1920(3). But section 1821(a)(1) of the Judicial Code provides that "except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section," which goes on to provide in other subsections that "a witness shall be paid an attendance fee of $30 per day for each day's attendance," § 1821(b), plus his travel time to and from the court, and lodging if an overnight stay is required, §§ 1821(c), (d). Sections 1821 and 1920 long predate the civil rights fees act. In *Crawford* the Court held that they bar the award of higher witness fees by federal judges under Rule 54(d) of the Federal Rules of Civil Procedure, the rule for the taxing of costs.

Crawford was not however a case in which the judge had rested his award of witness fees on another statute. And section 1821(a)(1) is, by its own terms, inapplicable

where a statute makes other provision for costs or witness fees. The question left open by *Fuller* (see 801 F.2d at 912) and by *Crawford* (see 482 U.S. at 445 (concurring opinion), 446 n. 1 (dissenting opinion)), but squarely posed by the present appeal, is whether the civil rights fees statute makes other provision for witness fees within the meaning of section 1821(a)(1). Notice that however this question is answered, the plaintiffs in this case would still be entitled to an award of fees incurred for advice, as distinct from testimony and preparation for testimony, by experts. Sections 1821 and 1920 do not bear on fees for nontestimonial services.

The defendants argue that *Crawford* requires reversal because the Court said, "We will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees. . . . We hold that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." 482 U.S. at 445. Read literally this statement provides strong support for the defendants' argument, but the literal intepretation of judicial language is no more defensible than the literal interpretation of statutory language. Read literally, the statement we have just quoted is in tension with the Court's recognition in the *Alyeska* opinion that the general cost-shifting statute (§ 1920) does not bar *all* forms of fee shifting that are grounded in equitable rather than statutory powers—does not for example bar an award of fees under the common-fund doctrine or as a sanction for a frivolous claim or defense. See 421 U.S. at 255-60. In any event, all *Crawford* says is that Congress's desire to bring a case within the exception to section 1821(b) must be plain; this is *not* the same as saying that the statute appealed to as making other provision for witness fees must, as the defendants argue, contain the words "witness fees" or recite that it is repealing section 1920 or section 1821(b). And unlike *Crawford*, this is not a case where a general grant of authority, such

as that contained in Rule 54(d), is appealed to against a specific provision, such as the witness fee statute. That statute is no more specific than the civil rights fees statute. If the former is specific with respect to shifting *witness* fees, the latter is specific with respect to shifting fees in *civil rights* cases. They are equally specific, or equally general.

The defendants press the following argument on us. When Congress passed the civil rights fees act it must have known, or at least it should be presumed to have known, that 28 U.S.C. §§ 1821 and 1920 were on the books and read together limited witness fees to $30 a day unless Congress provided otherwise. Therefore if Congress had wanted to lift the limit for expert witnesses in civil rights cases it would have said so. Repeals by implication are disfavored. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

We expressed our doubts about this well-known "canon of construction" in *Edwards v. United States*, 814 F.2d 486, 488-89 (7th Cir. 1987), feeling free to do so because, while the Supreme Court frequently cites the canon with favor, it frequently refuses to apply it, too. The canon is indeed a mixed bag. It protects some old statutes from, as it were, inadvertent destruction, but it threatens to impale new statutes on the concealed stakes planted by old ones. Congressmen do not carry the statutes of the United States around in their heads any more than judges do. The canon may therefore cause a forgotten old statute inadvertently to wreck a considered new one. That is a danger in this case. There is no indication that anyone drew Congress's attention to the witness fee statute during the deliberations preceding enactment of the civil rights fee statute. Although an appendix to the House committee report cites a number of fee-shifting statutes some of which expressly allow the award of expert-witness fees, this feature of those statutes—which are merely cited, and not described—is not mentioned in the appendix or elsewhere. See H.R. Rep. No. 1558, 94th Cong., 2d Sess. 13-14 (1976).

If Congress's knowledge of the entire contents of the United States Code cannot realistically be "presumed"—and it cannot—then the best that can be said for the canon against repeals by implication is, first, that it provides a mechanical rule for deciding difficult cases and thus makes law simpler and curbs judicial discretion, and, second, that it encourages legislators and their staffs to do a thorough search of previous statutes before enacting a new one. The first point identifies real, although limited, social goods (legal simplification and the reduction of judicial discretion), but the second strikes us as unrealistic about the conditions under which legislatures work. The canon seems in any event particularly inapt in a case such as this, because there is nothing to indicate that the general federal cost-shifting statutes express hostility to awarding the fees of party-retained expert witnesses in cases governed by a statute designed to enlarge the judicial power to shift costs. The issue had not arisen during the deliberations that preceded the enactment of the general statutes. If there is no conflict at the level of policy or purpose, then to give effect to the policy behind the later statute is not a "repeal" of the earlier one in a practical sense.

Perhaps the main problem with the canon is semantic—the connotations of "canon" and "canonical," which makes it sound like a rigid rule, whereas it may just be a reminder not to assume lightly that Congress repealed a statute without saying so. But we need not continue this exploration of the "canon" against repeals by implication, for it is not in fact applicable to this case. The witness fee statute by its own terms does not apply where Congress has made other provision for witness fees, so if the civil rights fees statute is such other provision there is no repeal or impairment of the earlier statutes. The plaintiffs say it is, but acknowledge that this appears not from the text of the statute but from its history and purpose. They emphasize a statement on the House floor by one of the bill's sponsors, Congressman Drinan, "that the phrase 'attorney's fee' would include the values of

the legal services provided by counsel, including all incidental and necessary expenses incurred in furnishing effective and competent representation." 122 Cong. Rec. H35123 (Oct. 1, 1976). This statement is entitled to little if any weight in determining the meaning of the statute, and not only because it does not mention expert-witness fees. Floor debates are not a reliable guide to the meaning of statutes. They are poorly attended and members of Congress can make additions to the *Congressional Record* after the debate without notice to their colleagues. See Katzmann, *Summary of Proceedings*, in Judges and Legislators: Toward Institutional Comity 162, 175 (Katzmann ed. 1988).

Of slightly greater significance is the fact that the Senate committee report cites, as examples of cases that had been overruled by *Alyeska* and would be reinstated as it were by the new statute, several cases in which courts had awarded expert-witness fees along with attorney's fees in the literal sense. The citation is indirect. The report notes that in the overruled cases the courts had been "following Congressional recognition in newer statutes of the 'private attorney general' concept [and] exercising their traditional equity powers to award attorneys' fees." S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976). In support of this proposition the report cites to a list of cases in the committee's hearings, see *id.* at 4 n. 3—and if one goes to this list one will find several case summaries that state that expert-witness fees had been awarded in the case. See *Legal Fees—Hearings before the Subcomm. on Representation of Citizen Interests of the S. Comm. on the Judiciary*, 93d Cong., 1st Sess. 911, 917, 1060 (1973).

Consistent with our skepticism about legislative omniscience, we are not convinced that these documents show that Congress actually adverted to the question whether expert-witness fees could be shifted along with attorney's fees. See *Blanchard v. Bergeron*, 109 S. Ct. 939, 946-47 (1989) (concurring opinion). That would require that members of Congress had read with some care the hearings

cited in the Senate committee report and appreciated the significance of the references to awards of expert-witness fees. There is no indication that they did, and it is unlikely. But this conclusion does not end the analysis. If Congress is not omniscient, this weakens one of the arguments of the plaintiffs but also shows that—the defendants to the contrary notwithstanding—little weight can be attached to Congress's failure to imitate the five statutes listed in the appendix to the House committee report that specify expert-fitness fees as a type of expense that the district court can shift to the prevailing party. All five were environmental statutes, where the need for expensive technical experts was too obvious to escape conscious legislative consideration; the last four were copies of the first.

The question what a statute means is only in part a function of what the legislators thought it meant. The scope of legislation is not circumscribed by the conscious thoughts of the legislators. Nor does the answer to an interpretive question turn on how the statute might be read by someone utterly ignorant of its background or by the same someone reading with the same literalism statements in the legislative history. "Clarity depends on context, which legislative history may illuminate." *In re Sinclair*, *supra*, 870 F.2d at 1342. We ask what meaning would be obvious to one familiar with the circumstances of enactment, including, here, the judicial history that provides the backdrop of the statute. We ask whether we can be confident that if someone had told Congress in the deliberations leading up to enactment that it had neglected to say anything about the shifting of expert-witness fees, Congress would have added language making clear to the most literal-minded that such fees could be shifted. We think it would have, and one reason is simply that we are given and can think of no reason against such shifting—especially given our earlier point that expert fees for advice and consultation can be shifted along with paralegal and other incidental expenses normally incurred in litigation. There would be a reason if the civil rights fees

statute had been a hard-fought compromise between those who wanted judges to have the broad equitable authority they had exercised before *Alyeska* and those who wanted no inroads made on *Alyeska*, for then the court's duty would be to give effect to the compromise, not to give proponents a victory that had eluded them in the legislative arena. See *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). But there is no indication of compromise on any issue relevant to this case, and the defendants do not argue it. All the evidence is to the contrary. Recognizing that most civil rights suits were not lucrative for the plaintiffs' lawyers, Congress wanted to make losing defendants bear the expenses of suit beyond the usual items taxable as costs. Why exclude expert-witness fees? Why in particular exclude those fees when they are incurred for testimony and its preparation but not when they are incurred for advice and consultation?

The most telling clue to the statute's meaning is the passage quoted above from the Senate committee report, discussing the equitable power exercised by courts prior to *Alyeska*, and a companion statement that "this bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision [*Alyeska*]." S. Rep. No. 1011, *supra*, at 6. The courts that until *Alyeska* had shifted attorney's fees and other expenses, including expert-witness fees, had relied on the existence of a federal equity power. "There is ample authority, outside the civil rights area, to support the proposition that the allowance of attorneys' fees and expenses of preparation for trial is in the discretion of the district court *sitting in equity* where exceptional circumstances call for their allowance in order to do justice between the parties." *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 295 (5th Cir. 1970) (emphasis in original). This equitable power was thought to extend to expert-witness fees, see, e.g., *Wallace v. House*, 377 F. Supp. 1192, 1206-07 (W.D. La.

1974); *Welsch v. Likins*, 68 F.R.D. 589, 596-97 (D. Minn. 1975); *Sabala v. Western Gillette, Inc.*, 371 F. Supp. 385, 394 (S.D. Tex. 1974)—indeed to any expense that the district court might reasonably believe should be shifted in order to do equity. See *Wallace v. House, supra*, 377 F. Supp. at 1206-07, and cases cited there. *Alyeska* held that with immaterial exceptions this equitable discretion did not exist. The Civil Rights Attorney's Fees Awards Act of 1976 restored it, using "reasonable attorney's fee" as a shorthand expression for such fees and other expenses as the district court might in the exercise of its equitable discretion reasonably believe should be reimbursed to the prevailing party. The term is the label for a power first asserted, then withheld, and finally restored; it is not an exhaustive description of the power.

It had long been understood that when expenses of litigation were shifted pursuant to the equity powers of the district court, the statutes providing for the taxing of "costs," such as section 1920 (which in turn incorporates by reference the limitations on witness fees in section 1821), did not apply. See, e.g., *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 284 U.S. 444, 447-48 (1932). So when Congress restored the equitable power to shift litigation expenses in civil rights cases, it took the question of expert-witness fees in such cases out of 28 U.S.C. §§ 1821 and 1920. No doubt it would be unrealistic to suppose that Congress actually considered the bearing of *Henkel* and like cases. But it is only on an assumption of omniscience that the failure to specify expert-witness fees becomes significant, for while an omniscient Congress would remember sections 1821 and 1920, equally it would remember *Henkel*. To assume omniscience not only is unrealistic, but leads nowhere.

We anticipate a floodgates argument of the following form. If the civil rights fees statute is interpreted to shift the entire expenses of the prevailing plaintiff to the defendant, then plaintiffs will seek awards for the opportunity costs of their time spent in testifying or preparing to testify, or for medical expenses for treating the anxiety

that litigation can trigger, or for the other consequential damages of participating even in successful litigation. But there is a reasonably bright line, which we do not think the framers of the fee statute meant to cross in seeking to resurrect a line of cases that had respected the line, between expenses incurred in hiring the inputs (of lawyer and other time, copying, and the like) necessary to prosecute a suit, and expenses incurred as a consequence of being a party even if you are indemnified for the full costs of suit. The latter category of expense raises problems of measurement and causality that the former does not and that even the most generous fee-shifting regimes exclude. See, e.g., *United States v. McPherson*, 840 F.2d 244 (4th Cir. 1988). We think the civil rights fees statute excludes these expenses too. See *Duncan v. Poythress*, 750 F.2d 1540, 1543 n. 12 (11th Cir. 1985); but see *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 30 (D.C. Cir. 1984). Our decision has, therefore, a limited scope.

It could of course be argued that one-way fee-shifting, which is essentially the regime created for civil rights litigation by the cases cited in *Hensley*, induces too much litigation. If so, then allowing expert-witness fees to be shifted is a move in the wrong direction. Maybe a big move, since those fees can be substantial—in this case they are almost one-fourth of the total award of fees, which in turn was the only form of monetary relief that the plaintiff and his class obtained. But the propriety of one-way fee shifting in civil rights cases was resolved when the Supreme Court held on the basis of the legislative history of the civil rights fees statute that prevailing plaintiffs are to be treated more generously than prevailing defendants. It would be both arbitrary and inconsistent with our best guess as to the meaning of the statute to hold that, of all expenses ordinarily shifted under fee-shifting statutes, only expert-witness fees are excluded.

We do not want to exaggerate the significance of our holding, however. There is little evidence that the shifting of fees has ever made much difference in the propensity to bring civil rights suits. See Eisenberg & Schwab,

The Reality of Constitutional Tort Litigation, 72 Cornell L. Rev. 641, 688-89, 693 (1987); Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 755, 766 (1988); cf. Percival & Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 Law & Contemp. Prob., winter 1984, at 233, 246-47 (1984). If it has not, then it is unlikely that our decision today will have a large practical impact, since expert-witness fees will ordinarily be only a fraction of attorney's fees.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 31, 1989.

Before
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. MYRON L. GORDON, *Sr. District Judge**

WALTER FRIEDRICH, Individually and on behalf of a class of similarly situated persons,

Plaintiffs-Appellees,

No. 88-3043 vs.

CITY OF CHICAGO and FRED RICE, Superintendent of Police, in his official capacity,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 7719—Marvin E. Aspen, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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* Honorable Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Friedrich, Walter

v. Case Number: 84 C 7719

City of Chicago, et al.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that we award plaintiffs' attorneys' fees and costs in the amount of $25,544.75, expenses in the amount of $13,867.87 and costs of $2,307.00. Judgment is entered in favor of plaintiffs in the amount of $41,721.62.

Date September 15, 1988

H. STUART CUMMINGHAM
Clerk

/s/ Gladys Lugo
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 84 C 7719 Date: SEP 15 1988

Name of Assigned Judge: MARVIN E. ASPEN

Case Title: Walter Freidrich vs. City of Chicago

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

Enter memorandum opinion and order: This matter is currently before the Court on plaintiffs' petition for attorneys' fees and costs under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988 (1982). For the reasons stated in the attached opinion, we award plaintiffs' attorneys fees in the amount of $25,544.75, expenses in the amount of $13,867.87 and costs of $2,307.00. Judgment is entered in favor of plaintiffs in the amount of $41,721.62.

* * * * *

(12) ☒ (For further detail see ☒ order attached to the original minute order form.)

* * * * *

[DATED SEPTEMBER 15, 1988]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 7719

WALTER FRIEDRICH, individually and on behalf of similarly situated persons,

Plaintiffs,

v.

CITY OF CHICAGO, a municipal corporation, FRED RICE, Superintendent of Police, in his official capacity,

Defendants.

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

This matter is currently before the Court on plaintiffs' petition for attorneys' fees and costs under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 (1982).

I.

The underlying suit challenged the constitutionality of an ordinance restricting street performances.[1] Friedrich,

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[1] Rather than set forth our holding in detail, we summarize briefly our resolution of the underlying litigation. *See* Friedrich v. City of Chicago, 619 F.Supp. 1129 (N.D. Ill. 1985).

representing a class of street performers, sought to enjoin the City of Chicago from enforcing the ordinance claiming the ordinance deprived plaintiffs of their First Amendment right to expression as well as their Fourteenth Amendment right to equal protection of the laws. This Court granted in part and denied in part plaintiffs' request for permanent injunctive relief. *Friedrich v. City of Chicago*, 619 F.Supp. 1129 (N.D. Ill. 1985). We struck down and permanently enjoined the enforcement of certain provisions of the ordinance that restricted the times and locations where street performances could occur as well as the provision requiring a permit for the use of sound amplification equipment. Specifically, we determined that the ordinance was unconstitutional to the extent that it was broader than necessary to protect the City's legitimate interest in public safety. Moreover, we held that the provision of the ordinance requiring a special permit for sound amplifiers was unconstitutional because it did not specify how to obtain such a permit and set no guidelines with regard to granting such a permit.

Plaintiffs now seek attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), which authorizes the district court to award reasonable attorney's fees to prevailing parties in civil rights litigation. Reimbursement for expenses reasonably incurred by the plaintiffs' attorneys in the prosecution of the case are also sought.

Defendants concede that plaintiffs are the prevailing party[2] within the meaning of the statute since plaintiffs

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[2] The standard adopted in this circuit to determine if the plaintiffs have prevailed is whether they have succeeded "on any significant issue in litigation which achieves some of the benefit to

(Footnote continued on following page)

succeeded in obtaining some affirmative relief from the district court. The dispute in this case revolves around the proper amount to which plaintiffs are entitled pursuant to § 1988. It remains, then, for this Court to determine what fee is "reasonable."

II.

The Supreme Court has decided that the "product of reasonable hours times a reasonable rate" normally provides a "reasonable" attorney's fee within the meaning of § 1988. *Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541, 1548 (1984). Plaintiffs have submitted a petition requesting $25,544.75 in attorneys' fees. They have arrived at this figure by multiplying 292.90 hours of legal work by their attorneys' current market billing rates. These figures break down as follows:

Attorney:

lead counsel—149.25 hours at $125/hour

associate counsel—23.60 hours at $70/hour

Law Graduate: 43.45 hours at $50/hour

Law Student: 76.60 hours at $40/hour

Plaintiffs have supported by affidavit the number of hours worked by plaintiffs' attorneys, the activities engaged in during these hours and the current market value of the legal services of these attorneys and support personnel.

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[2] *continued*

the part[y] sought in bringing the suit." Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1278 (1983) (citing Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983)). The Supreme Court has instructed that this formulation is a generous one which only brings the plaintiff over the statutory threshold. *Hensley*, 461 U.S. at 434, 103 S.Ct. at 1939.

Defendants do not challenge the rates requested by plaintiffs;[3] instead, defendants challenge the net total as being excessive in light of what defendants insist was plaintiffs' limited success in securing only partial relief. Moreover, defendants assert that plaintiffs promulgated several distinct claims and that the time spent on unrelated claims should be excluded altogether from the fee request.[4]

In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), the Supreme Court provided guidelines for calculating the appropriate amount of an attorney's fee award in cases where the plaintiff only partially prevails. The Court divided these partial recovery cases into two categories. *Spanish Action Committee of Chicago*, 811 F.2d 1129, 1133 (7th Cir. 1987); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1279-80 (7th Cir. 1983). In the first category are cases where the plaintiff presents distinctly different claims for relief that are based on different facts and legal theories. *Spanish Action*, 811 F.2d at 1133. If the plaintiff presented "distinctly different" claims for

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[3] Defendants oppose compensation for law student's time, arguing that plaintiffs should absorb these costs as overhead expenses. This argument is without merit. The Seventh Circuit has stated that "the better rule is to allow compensation for law clerks as attorneys' fees under § 1988. Such a policy encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes." Cameo Convalescent Center, Inc. v. Senn, 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied*, 469 U.S. 1106, 105 S.Ct. 780 (1985). *See also Spanish Action Committee of Chicago*, 811 F.2d 1129, 1138 (7th Cir. 1987) (law clerk and paralegal fees recoverable).

[4] The district court has considerable discretion to assess what constitutes a reasonable rate and a reasonable number of hours under the circumstances of each case. *Berberena v. Coler*, 753 F.2d 629 (7th Cir. 1985).

relief that were based on different facts and legal theories, he would not be entitled to recover attorney's fees for time expended on an unsuccessful claim if that claim was "distinct in all respects from his successful claim." *Hensley*, 461 U.S. at 440, 103 S.Ct. at 1943. Unrelated claims must be treated "as if they had been raised in separate lawsuits." *Id.*; *see also Spanish Action*, 811 F.2d at 1133.

A different situation arises, however, when the plaintiff in a partial recovery case has asserted unsuccessful claims related to the successful claims by a "common core of facts" or that are based on "related legal theories." *Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940. The Supreme Court has instructed that the time spent on these related but unsuccessful claims should not automatically be excluded in determining a reasonable attorney's fee award. Instead, the court should focus on "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id. Hensley* concluded that the critical determination that the court must make under the second part of its analysis is "the extent of the plaintiff's success" in terms of "the results obtained." *Id.* at 437, 103 S.Ct. at 1941. Where the plaintiff has achieved "excellent results" and procured "substantial relief," his attorney should recover a fully compensatory fee normally encompassing all hours reasonably expended on the litigation. *Id.* at 436, 103 S.Ct. at 1940. "[T]he fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Id.* Where the plaintiff fails to secure all that he requested and achieves only partial or limited success, the lodestar amount—the product of the number of attorney's hours reasonably expended on the litigation as a whole times a reasonable hourly rate—may be excessive. *Id.* at 436, 103 S.Ct. at 1941. The Supreme Court thus

instructed: "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.* at 440, 103 S.Ct. at 1943. The Court, however, did not delineate a precise formula for making such a reduction, instead leaving this determination to the discretion of the district court because of its greater familiarity with the litigation. *Id.* at 436-437, 103 S.Ct. at 1941. The Court did suggest that a district court in paring a fee award to consider the plaintiff's limited success, may attempt to identify specific hours that should be eliminated or may simply reduce the award across the board to account for the limited success.

City defendants assert that plaintiffs' challenge to the various provisions and applications of the ordinance were, in essence, several distinct claims, and as only a partially prevailing plaintiff, the time expended on the unrelated claims should be excluded from plaintiffs' fee request. Plaintiffs, on the other hand, argue that their various objections to specific provisions and applications of the ordinance were subsumed by the broader claims set forth in the complaint that the enforcement of the ordinance deprived them of their right of freedom of expression and denied them the equal protection of the laws. Plaintiffs also argue that even if this Court views claims as distinct, the claims satisfy the "relatedness" test derived from the *Hensley* court. Thus, there is no basis for excluding the time plaintiffs spent on unsuccessful claims.

The *Hensley* court recognized that "there is no certain method of determining when claims are 'related' or 'unrelated.' " *Hensley*, 461 U.S. at 436 n.12, 103 S.Ct. at 1941 n.12. The Seventh Circuit has read the *Hensley* case as instructing that "the starting point for separating an *un*related, unsuccessful claim from a related, unsuccessful claim is to determine whether a particular unsuccessful

claim shares a 'common core of facts' with the successful claim or is based on a 'related legal theory.' " *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1279 (1983). The court in *Mary Beth G.* further asserts that

> a useful tool for making this determination to *focus on whether the claims seek relief for essentially the same course of conduct.* Under this analysis, an unsuccessful claim will be *un*related to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.

Id. at 1279 & n.15 (emphasis added).

In this case, the City defendants' argument that the claims were unrelated because each challenged separate, "wholly autonomous" geographical areas is unconvincing. The same applies to the City defendants' argument that the plaintiffs' geographic claims are totally unrelated to their sound amplification claim. This is because the City defendants have failed to extend their analysis of the distinct claims to concentrate on whether the claims "seek relief for essentially the same course of conduct." *Id.* Plaintiffs' challenges were all directed at removing the number of restrictions on street performances. Plaintiffs' unsuccessful alternative Fourteenth Amendment argument and their various constitutional challenges as to time, place and manner of restriction were requesting relief for a course of conduct that was not "distinctly different" from that relating to the successful claims.

Plaintiffs also assert that it is appropriate to fully compensate their attorneys for the requested hours and at the requested rate because they have already excluded from their fee petition the hours of service expended by

the law firm of Schiff, Hardin & Waite ("Schiff").[5] Furthermore, plaintiffs have reduced the total number of billing hours for their attorneys whose hours are included in this petition by approximately 130 hours in an effort to exercise billing judgment. Thus, plaintiffs insist that the amount they seek is reasonable since it represents a trimmed version of their fees incurred which would have been excessive in light of the degree of success obtained.

City defendants argue that the approximately 300 hours of service submitted for compensation is excessive and should not be entirely awarded because plaintiffs only secured limited relief. City defendants contend that even if plaintiffs had secured successful results overall, the 600 hours they trimmed from their fee request would have been excludable as excessive (defendants claim that the suit was overstaffed) and thus the fee request must be reduced over and beyond the trimmed duplicative hours in order to reflect the limited success.[6]

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[5] In computing the total, plaintiffs excluded approximately 600 hours incurred by the law firm of Schiff, Hardin & Waite with a billing value of approximately $49,000, as well as excluding hours put in by a volunteer attorney at the ACLU.

[6] Pursuant to Local Rule 46, defendants have moved to strike that portion of the plaintiffs' reply brief wherein plaintiffs submitted time records for Schiff, claiming that the submission is not properly before the court. First, Local Rule 46 refers only to the time for filing petitions for attorneys' fees, not to any time limit for filing supporting materials. Thus, because plaintiffs do not seek to recover the fees set forth in Schiff's time records, Local Rule 46 is irrelevant. Additionally, the inclusion of the actual records is properly before this Court as rebuttal to the City's argument "[t]hat Schiff, Hardin & Waite did not submit any hours (and now cannot because the 90 day time-limit for submitting their time has run) is an admission of and demonstrates the duplication of effort on this lawsuit." (Defendants' Memorandum in Opposition, p. 8). The only way we can determine if this allegation is true is to review the actual records. Therefore, we deny City defendants' motion to strike plaintiffs' reply memorandum.

Plaintiffs, on the other hand, assert that they are entitled to the fee amount requested since they obtained substantial relief. The Supreme Court requests the district court to be certain it has considered the relationship between the amount of the fee awarded and the results obtained. *Hensley*, 461 U.S. at 436-37, 103 S.Ct. at 1941. The extent of the plaintiffs' success is measured by comparing the results obtained from bringing the lawsuit with the relief plaintiffs sought. *Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564, 569 (7th Cir. 1983). In the present case, plaintiffs' objective, as stated in their complaint, was to obtain a declaratory judgment that the challenged ordinance was unconstitutional under the First and Fourteenth Amendments and to secure a permanent injunction prohibiting defendants from enforcing the challenged portions of the ordinance. This Court granted plaintiffs' request in part when it permanently enjoined portions of the challenged ordinance. Even though plaintiffs' alternative Fourteenth Amendment argument failed, it is not necessary that a prevailing plaintiff receive all the relief requested. "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Hensley*, 461 U.S. at 435, 103 S.Ct. 1940; *see also Lenard v. Argento*, 808 F.2d at 1245-46 (7th Cir. 1987) ("[T]he lawyer] is not to be penalized [for advancing a number of theories] just because some, or even all but one, are rejected, provided that the one or ones that succeed give him all that he could reasonably have asked for"). Moreover, the Supreme Court has rejected a mathematical approach comparing the total number of issues in the case with those actually prevailed upon. *Hensley*, 461 U.S. at 435 n.11, 103 S.Ct. 1940 n.11. The Supreme Court has counselled instead that it is the result that matters. *Id.* Therefore, it remains for

this Court to determine whether the partial permanent injunction granted in this case fulfills plaintiffs' objective as stated in the complaint. *Lenard*, 808 F.2d at 1245-46.

An analysis of the plaintiffs' partial success indicates that the net effect of the court's "surgical excision" of the constitutionally defective parts of the ordinance is that plaintiffs are no longer restricted from performing on North Rush Street during a significant period of time previously regulated by the ordinance. Plaintiffs are now restricted for only eight hours a week (Friday and Saturday, 7-11 p.m.), where they formerly were restricted for 24 hours a week (Wednesday, Friday and Saturday, 3-11 p.m.). Furthermore, these restrictions are only enforceable to the extent that they reach Rush Street north of Oak Street, instead of Rush Street north of Delaware Place, reducing the "place" restrictions in the North Rush Street area by about half. On North Michigan Avenue, plaintiffs are now free to perform for four weekday evenings and on Sundays where they previously were restricted by the ordinance (Monday-Thursday, 7:30-10 p.m. and Sunday, 5:30-10 p.m.). Plaintiffs also succeeded in obtaining injunctive relief for that provision of the ordinance requiring a special permit for sound amplifiers because the provision vested in public officials unfettered discretion to issue or deny the permit.

In conclusion, plaintiffs achieved a great deal of relief on the major issue of litigation. Moreover, plaintiffs have voluntarily reduced their fee request from approximately $75,000 to $25,544.75 to reflect their partial success. As the Supreme Court has counselled:

> (t)here is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or

> it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.

There is no reason to reduce the fee request further because plaintiffs failed to convince the Court that every provision of the ordinance was an unconstitutional time, place and manner restriction or because the Court rejected plaintiffs' alternative equal protection argument. *Hensley*, 461 U.S. at 435 n.11; 103 S.Ct. 1940-41 n.11. Furthermore, there exists no evidence of overstaffing to justify reducing the fee request; plaintiffs' time sheets were adequately documented. In reviewing these time records, we observe no evidence that any of the listed hours pertained only to successful claims; the time was expended on the litigation as a unit. Accordingly, having reviewed the detailed time sheets and accompanying affidavits submitted by plaintiffs, we find that plaintiffs are entitled to a fee award in the amount requested.

III.

Plaintiffs also seek $13,590.52 for expenses incurred in this litigation. Defendants object to expenses incurred by Schiff, Hardin & Waite in the amount of $2,140.36 because Schiff, although it billed 600 attorney hours on this litigation, did not file a request for fees. We do not believe this should prohibit Schiff from recovering its out-of-pocket fees. These expenses were originally requested under the Roger Baldwin Foundation's expense request. Because we found that request inadequately documented, we directed plaintiffs to itemize carefully, and they did so. The fact that the new itemization revealed that Schiff paid the expenses is no reason to disallow them. Therefore, we reject this argument.

Defendants also object to plaintiffs' request for expert witness fees. Because the Seventh Circuit in dicta had indicated that expert witness fees might not be recoverable as costs under § 1988, in *Chicago College of Osteopathic Medicine*, 801 F.2d 908, 912 (7th Cir. 1988), we requested supplemental briefs. However, the Seventh Circuit has since answered the question in *Bright v. Land O'Lakes, Inc.*, 844 F.2d 436, 444 (7th Cir. 1988). In *Bright*, the court indicated that 28 U.S.C. § 1821 does not restrict costs or fees clearly within a fee shifting statute. *Id.* Although *Bright* was not under § 1988, it is clear that *Chicago College's* dicta is no longer valid. *Bright* goes on to discuss what expenses are recoverable under the fee shifting statutes such as § 1988:

> This court has interpreted attorney fee shifting statutes to include an award of "out-of-pocket expenses in preparation for trial." *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984). These expenses might include, among other items, "expenses for such things as postage, long-distance calls, xeroxing, travel, paralegals, and expert witnesses." *Heiar v. Crawford County*, 746 F.2d 1190, 1203 (7th Cir. 1984) (dicta) (fees allowed by the Civil Rights Attorney's Fees Awards Act), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985).

Bright, 844 F.2d at 444. Accordingly, we see no reason to question the recoverability of expert witness fees under § 1988.

Because we find that plaintiffs' expenses were reasonable and adequately documented and supported by a third party's affidavit, we approve plaintiffs' request for expenses set forth below:

Disbursements by Schiff Hardin & Waite:

Telephone tolls	$ 179.77	
Copier charges	1,052.24	
Filing fees	100.00	
Express mail	155.75	
Photographs	200.60	
Computerized research	252.00	
Word processing	198.00	
		$ 2,138.36

Disbursements by the Roger Baldwin Foundation of ACLU, Inc. (RBF):

Telephone charges	$ 24.71	
Federal Express charges	100.00	
Filing fee	60.00	
Photocopy expenses	437.04	
Photograph - aerial enlargements	265.00	
Depositions - defense experts John Flanagan and William Callaghan	916.85	
		$ 1,803.60

Expert Witness Fees and Expenses:

William H. Whyte	$ 2.2026.66	[sic.]
Robert J. DiGrazia	7,901.25	
		$ 9,927.91

Total Expenses	13,869.87

IV.

Both parties to this litigation assert that they are entitled to costs under Rule 54(d) of the Federal Rules of Civil Procedure.[7] Rule 54(d) of the Federal Rules of Civil Procedure directs that "costs shall be allowed as of course to the prevailing party unless the district court otherwise directs." We have already determined that plaintiffs, while not obtaining complete success, have satisfied the prevailing party threshold of § 1988. Courts in other circuits have concluded that the test for prevailing party under Rule 54(d) should be the same as the test for prevailing party under 42 U.S.C. § 1988 because it "simplifies] the litigation of disputes concerning costs and fee awards." *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 926 (3d Cir. 1985); *see also Studiengesellschaft Kohle MBH v. Eastmen Kodak Co.*, 713 F.2d 128, 131 (5th Cir. 1983). Moreover, a party need not prevail on all issues to justify an award of costs: the party who has some relief, "even though he hasn't sustained all of his claims" is the prevailing party under Rule 54(d). 10 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2667 at 180-81 (1983). Plaintiffs, and not City defendants, are the prevailing party within the meaning of Rule 54(d) and are entitled to recover costs.

Under Rule 54(d), there is a strong presumption that the prevailing party will be awarded costs. *Muslin v. Frelinghuysen Livestock Managers, Inc.*, 777 F.2d 1230, 1235 (7th

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[7] Plaintiffs submitted a bill of costs pursuant to Fed.R.Civ.P. 54(d) and was awarded costs in the amount requested on November 6, 1985. On January 23, 1986, defendants filed for and was granted a motion for enlargement of time to file objections to plaintiffs' bill of costs instanter until January 30, 1986. Because this Court never vacated the order to award costs to plaintiffs, the question of who is entitled to costs remains an open question.

Cir. 1985) (citing *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351, 101 S.Ct. 1146, 1149 (1981)). The Seventh Circuit has concluded that in order to overcome the presumption in favor of the prevailing party, "the losing party must demonstrate that 'there has been some fault, misconduct, default, or action worthy of penalty on the party of the prevailing side." *Hudson v. Nabisco Brands, Inc.*, 758 F.2d 1237, 1242 (7th Cir. 1985). The defendant has not shown that the plaintiff should be penalized by the denial of costs: limited success is not "misconduct" that would warrant denying costs to the plaintiffs in this case. Therefore, in the absence of some showing of bad faith on the part of the plaintiffs, they should not be denied costs. Accordingly, plaintiffs are entitled to recover from City defendants their costs of $2,307.00.

In conclusion, we award plaintiffs' attorneys fees in the amount of $25,544.75, expenses in the amount of $13,867.87 and costs of $2,307.00. The Clerk is directed to enter a judgment in favor of plaintiffs in the amount of $41,721.62. It is so ordered.

/s/ Marvin E. Aspen
MARVIN E. ASPEN
United States District Judge

DATED 9/15/88